A **BUMIPUTRA-COMMERCE BANK BHD**

**v.**

**SITI FATIMAH MOHD ZAIN**

B HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S7-22-730-2005]
14 JULY 2010

C ***BANKING:*** *Banker and customer - Overdraft facility - Wrongful creation in favour of defendant - Defendant made withdrawals on facility - Plaintiff froze defendant's account and demanded repayment of moneys withdrawn - Counterclaim by defendant for damages - Mistake of fact - Fraud - Restitution - Unjust enrichment - Change of position - Defendant* D *obliged to repay moneys - Defendant not entitled to damages*

***CONTRACT:*** *Mistake - Mistake of fact - Wrongful creation of overdraft facility in favour of defendant - Defendant made withdrawals on facility - Plaintiff froze defendant's account and demanded repayment* E *of moneys withdrawn - Counterclaim by defendant for damages - Fraud - Restitution - Unjust enrichment - Change of position - Defendant obliged to repay moneys - Defendant not entitled to damages*

The defendant was a customer of the plaintiff bank since 1998 and operated a current account. In 2004, an overdraft facility was F wrongfully created in her favour for the sum of RM1,000,000. Although she never applied for it, she made withdrawals on this facility. When the plaintiff found out about it, they froze the current account and demanded repayment of the sum of RM671,915.83 which had been debited as at 31 October 2004 G from the account. The defendant refused to do so, leading to this claim being filed. The plaintiff contended that they were entitled to the repayment of the said moneys from the defendant on account of moneys had and received through mistake of fact, and also to restitution of the same based on unjust enrichment. The H defendant, however, claimed that she had no obligation to repay the said sum as whatever transpired flowed from the plaintiff's own fault. She also counterclaimed for a sum of RM700,000 on the basis that the plaintiff had wrongfully frozen her account thereby causing losses to her business and damaging her I reputation. The issues requiring consideration were: (i) whether

the defendant was obliged to repay the moneys; and (ii) whether she was entitled to damages on her counterclaim as a result of the plaintiff freezing the current account.

**Held (allowing the plaintiff's claim; dismissing the defendant's counterclaim):**

**(1)** It was indisputable that the overdraft facility was created through a mistake on the part of the bank. The defendant had admitted that no application was made for such a facility. There was also evidence adduced by the bank that some form of fraud had been perpetrated by rogues who were out to enrich themselves at the bank's expense, and it was through these rogues' machinations that the overdraft facility was wrongfully created. With this factual matrix, there was more than sufficient evidence that moneys had been made available and eventually paid over to the defendant under a mistake of fact. The causal test was also satisfied as it seemed obvious that no such moneys would have been available or paid over if the bank had known about the mistake or the fraud. This was further fortified by the fact that no consideration was provided for the overdraft facility. (para 23)

**(2)** As to whether the defendant could rely on the defence of change of position, with the evidence presented and even allowing for all possible inferences to be made in her favour it was this court's assessment that, at the very least, she knew of the bank's mistake in making available the overdraft facility. At worst, she was complicit to the illicit plan to defraud the bank. In either case, she was certainly not acting in good faith. In fact, the evidence showed that, if not dishonesty, there was certainly an element of bad faith on her part. Her claims of fault on the part of the bank must be seen in this light. In any event, a consideration of fault or even negligence or carelessness on the bank's part was irrelevant. It was beyond doubt that the defendant had been enriched at the expense of the bank and in the circumstances, it would be unconscionable and inequitable and thus unjust to deny restitution to the bank. (paras 24 & 25)

**(3)** There was some confusion on the bank's part when they tried to claim the usual interest, penalty interest, service charge and commitment fees that usually follow withdrawals made on an overdraft facility. It was not open to them to treat the defendant as having obtained a legitimate overdraft facility and then proceed to levy the aforementioned charges. It would be akin to blowing hot and cold at the same time. Either they had granted the overdraft facility or they had not. It was clear in the instant case that they had not. There was no such agreement to do so. The bank was therefore only entitled to restitution. (para 27)

**(4)** In view of the conclusion that the moneys which were received by the defendant were paid over on account of a mistake of fact, the counterclaim could not be sustained. Since the defendant had refused to pay over the moneys when requested to do so by the plaintiff, it was reasonable for the bank to freeze the account. It became imperative for them to do so when the fraud was discovered. For these reasons, the counterclaim must fail. (para 29)

**Case(s) referred to:**

*Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim [1998] 2 CLJ Supp 332* ***(refd)***

*Barclays Bank Ltd v. WJ Simms, Son and Cooke (Southern) Ltd [1980] QB 677* ***(refd)***

*Commercial Bank of Australia Ltd v. Younis [1979] 1 NSWLR 444* ***(refd)***

*Dextra Bank & Trust Co Ltd v. Bank of Jamaica [2002] 1 All ER (Comm) 193* ***(refd)***

*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32* ***(refd)***

*Kelly v. Solari [1841] 9 M & W 54* ***(refd)***

*Kleinwort Benson Ltd v. Lincoln City Council [1998] 3 WLR 1095* ***(refd)***

*Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349* ***(refd)***

*Lipkin Gorman v. Karpnale Ltd [1991] 2 AC 548* ***(refd)***

*Moses v. Macferlan [1760] 2 Burr 1055* ***(refd)***

*Niru Battery Manufacturing Co v. Milestone Trading Ltd [2003] EWCA Civ 1446* ***(refd)***

*The Sales Tax Officer, Banaras and Ors v. Kanhaiya Lal Makund Lal Sarat AIR (46) [1959] SC 135* ***(refd)***

*Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669* ***(refd)***

*Woolwich Equitable Building Society v. Commissioners of Inland Revenue [1993] AC 70* ***(refd)***

**Legislation referred to:**
Contracts Act 1950, s. 73

Contracts Act 1872 [Ind], s. 72

**Other source(s) referred to:**
*Chitty on Contracts, General Principles,* vol 1, 28th edn, 1999, pp 1012, 1467, 1479 paras 30-010, 30-031
Goff & Jones, *The Law of Restitution,* 6th edn, 2002, pp 17, 195, 199, 821, paras 1-016, 4-024, 4-028, 40-001

*For the plaintiff - Ramesh Gopal (Joanna K Thevathasan with him); M/s Rajes Hisham Pillai & Gopal*
*For the defendant - In person*

*Reported by Suresh Nathan*

## JUDGMENT

**Harmindar Singh Dhaliwal JC:**

**[1]** The defendant was a customer of the plaintiff bank since 1998. She operated a current account. In 2004, an overdraft facility was wrongfully created in favour of the defendant for the sum of RM1,000,000. The defendant had never applied for it. The defendant was nevertheless quite happy to make withdrawals on this facility. The plaintiff bank was initially oblivious of this state of affairs but soon found out about it. Apparently, it was the work of some rogues who were out to make some easy money. The plaintiff bank then proceeded to freeze this current account and demanded for repayment of the sum of RM671,915.83 which had been debited as at 31 October 2004 from the said current account. The defendant refused to do so which inevitably led to the filing of this claim.

**[2]** In her defence, the defendant Siti Fatimah appears to claim rather curiously that that she had no obligation to repay the said sum as whatever that transpired flowed from the plaintiff's own fault. She is also counterclaiming for a sum of RM700,000 on the basis that the plaintiff had wrongfully frozen her account thereby causing losses to her business as well as damaging her reputation. The broad issues in this case are therefore, firstly, whether the defendant is obliged to repay the monies and, secondly, whether she is entitled to damages on her counterclaim as a result of the plaintiff freezing the current account.

A **The Facts**

**[3]** The evidence adduced at the trial revealed the following facts. The defendant had a current account with the plaintiff bank since 26 June 1998 at the Jalan Tun Sambanthan branch. On or around 18 February 2004, an overdraft facility was wrongfully or fictitiously created in favour of the defendant for the sum of RM1,000,000. No application for this facility was ever made by the defendant. So how could this facility have been granted?

**[4]** It transpired that soon after the overdraft facility was granted, suspicions were raised as to its authenticity for a variety of reasons. It was discovered that no application was ever made for this facility. An investigation was launched by the plaintiff through its Group Internal Audit Division. The audit officer who was instructed to carry out the investigations (PW4) testified that he found six fictitious overdraft facilities that were created for varying amounts for six different customers.

**[5]** In the course of his investigations, PW4 also interviewed the defendant and her brother. They admitted to him that a third person had approached them and told them that he could arrange an overdraft facility for the defendant without going through the formal process as long as they were prepared to pay a commission of 20% on the amount of the facility granted. The defendant and her brother agreed.

**[6]** After about a week, the facility was available to the defendant. PW4 testified that the defendant told him that a sum of RM200,000 was then paid to the third party as agreed. The statement of accounts of the defendant shows that a withdrawal of RM200,000 was made on 19 February 2004. This withdrawal was made through a cheque with the defendant Siti Fatimah as payee. The defendant did not really dispute this. She however claimed that everything was arranged by her brother who has since disappeared after taking another RM250,000 from her. Now the question that still remains is this – how was this third person able to arrange this facility?

**[7]** After the investigations carried out by the bank were concluded, the plaintiff's officer (PW3) lodged a police report on 27 February 2004. This report sets out the nature of the investigation that was carried out as well as the manner in which the illicit activities were perpetrated. The whole report is therefore worth reproducing and appears as follows:

Pada 16/2/2004, pihak kami (EPIC I Sdn Bhd) subsidiri milik sepenuhnya Bumiputra-Commerce Bank Berhad telah membuat varifikasi pelanggan dan mengesan bahawa pada 3/12/2003 satu transaksi telah dilakukan dengan mendebit akaun Pinjaman Perumahan, Rabiah bt. Osman (A/C No: 14320001004952) sebanyak RM2,780.00 dan Mohd Noh bin Abu Bakar (A/C No: 14330001068955) sebanyak RM3,500.00 dimana kedua-dua transaksi ini berjumlah RM6,280.00. Pada hari yang sama pula, dua lagi transaksi dilakukan dimana RM3,294.04 dikreditkan ke dalam akaun Mohd Zaki bin Othman dan RM2,983.96 dikreditkan ke dalam akaun Farrah menjadikan jumlahnya RM6,280.00 juga. Semua transaksi ini telah dilakukan oleh Mohd. Zaki bin Othman (K/P No: 810818-01-5773), seorang staf kontrak dari Agency Select Appointment Sdn Bhd, untuk tujuan menipu. Pada 20/4/2004, pihak kami telah membuat varifikasi transaksi pelanggan dan kami telah mengesan satu transaksi yang dilakukan pada 9/12/2003, mendebit akaun Pinjaman Perumahan Musa bin Mohamad (A/C No: 05150000162953) sebanyak RM10,000.00 dan pada hari yang sama RM10,000.00 pula telah dikreditkan kepada akaun (14430006255053) Bintang Tuah Trading, tanpa perakuan yang sah, untuk menipu syarikat kami. Pada 23/4/2004, kami juga telah mengesan satu lagi transaksi yang dibuat pada 29/12/2003 mendebit akaun Pinjaman Perumahan Shadan bin Zainudin (A/C No: 14360000368953) sebanyak RM5,000.00 dan pada hari yang sama jumlah wang yang sama dikreditkan, tanpa kebenaran yang sah ke dalam akaun Syarikat Bintang Tuah Trading (A/C No: 14430006255053), kami mensyaki bagi tujuan menipu. Transaksi ini telah dibuat menggunakan ID staf kontrak dari Agency Select Appointment Sdn Bhd, Noor Fazlina bt. Yacub, K/P No: 831215-05-5082. ID Noor Fazlina bt. Yacub, juga telah digunakan dengan niat jenayah pada 6/1/2004 mewujudkan kemudahan overdraf yang palsu, untuk X-Fish Enterprise (A/C N: 12090009633055) sebanyak RM520,000.00 dan pihak syarikat berikut, Sifami Enterprise (A/C No: 142700006651056) sebanyak RM1,000,000.00 dan Syarikat Akar Trading & Construction sebanyak RM400,000.00. Semua pihak syarikat-syarikat ini telahpun mengeluarkan sebahagian besar wang dari kemudahan overdraf yang palsu ini. Selain dari penipuan yang disyaki dilakukan oleh dua staf di atas, kami juga telah mengesan ID seorang lagi staf kontrak dari Kelly Services Sdn Bhd bernama Ahmad Shaiful Kamal bin Abd. Karim (K/P No: 800427-08-5599) yang juga digunakan untuk mewujudkan kemudahan overdraf palsu untuk Syarikat Cosmohub Sdn Bhd (A/C No: 12380003879058) sebanyak RM800,000.00. Seorang lagi staf yang disyaki terlibat dengan kegunaan IDnya dalam penipuan ini ialah Mohd Gharib

A bin Ab. Rahman (K/P No. 66102-08-8685) yang telah mewujudkan kemudahan overdraf palsu untuk Syarikat Paradigm Film Sdn Bhd sebanyak RM800,000.00. Semua syarikat yang terlibat dalam penipuan ini mempunyai akaun dengan Bumiputra-Commerce Bank Berhad. Sejauh ini kerugian yang dialami oleh syarikat kami adalah RM3,323,602.76.

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**[8]** PW4 also told the court that arising out of their investigations, three contract tellers had their services terminated while disciplinary action was taken against two bank officers. He also knew from the police that two persons were arrested and released on bail. The defendant and her brother had also been questioned by the police. However, even though the report was lodged some six years ago, no one has been charged as yet.

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## The Contentions

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**[9]** The plaintiff bank is contending that they are entitled to the repayment of the said monies from the defendant on account of monies had and received through mistake of fact and also entitled to restitution of the same based on unjust enrichment.

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**[10]** Although the defendant is adamant in resisting this claim, her precise reasons for doing so are a little unclear. In her defence and in her testimony in court, she says that it was up to the plaintiff as to whether they had wanted to grant the overdraft and if they had chosen to do so, they could not now hold the defendant accountable. It was a peculiar line of reasoning based somewhat, to my mind, on a loose "finders-keepers" argument. This approach was also set out in a letter by her solicitors in response to the plaintiff's letter of demand the relevant parts of which reads as follows:

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> Our client confirms that your client opened a Current Account No: 1426-0003608-05-03 on 26th June 1998 in the name of Sifami Enterprise at your Jalan Thambapillai Branch, Brickfields, Kuala Lumpur.

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> Your client had, according to your letter, granted an overdraft facility of RM1,000,000.00 on 18th February 2004 to our client. Further, our client was also informed of this by the staff of the account holding branch.

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As a consequence, our client in an effort to develop their business continued to transact through the said account. Your client continued to maintain our client's account by honouring cheques and accepting deposits into the said account. In addition, your client issued monthly statements, charged month end overdraft interest and imposed monthly commitment fee.

Our client did not at any time attempt to drawdown the full overdraft facility but instead continued to operate her account with the knowledge that the overdraft facility was made available to her by your client. Further our client did not at any time utilise the facility to the maximum limit granted of RM1,000,000.00.

Your client, has instead acted *mala fide* by freezing our client's account at the end of April 2004 without any written notice. However, despite freezing the account your client continued to debit our client's account with monthly overdraft interest and commitment fee. To date there has been no written communication extended by your client to our client in any matter whatsoever including the freezing of the current account.

Your client has by their action caused losses and damage to our client's business image, credibility and reputation. In addition, your client's action has caused our client's business to go into financial ruin affecting sales and loss of confirmed and pending business contracts.

**[11]** The defendant now also claims that it is unfair for the bank to claim the money from her as she no longer has it as her brother has taken it and absconded. In summary, the defendant appeared to be pleading ignorance of the whole state of affairs except for the fact that an overdraft facility was made available to her.

## The Relevant Law – Action For Monies Had And Received, Payments Made Under Mistake Of Fact And Recovery Through Unjust Enrichment

**[12]** Payments made under a mistake of fact are commonly recovered through an action for monies had and received. Lord Mansfield in *Moses v. Macferlan* [1760] 2 Burr. 1055 stated that the action for money had and received will only lie when it is inequitable for the defendant to retain the money which the plaintiff claims (see Goff & Jones, *The Law of Restitution*, 6th ed (2002) at p 821, para 40-001). Lord Mansfield explained that "the gist of this kind of action is that the defendant, upon the

A circumstances of the case, is obliged by the ties of natural justice and equity to refund the money" (at p 1012; see also *Chitty on Contracts, General Principles*, vol. 1, 28th ed (1999) at p 1467, para 30-010).

B **[13]** On recovery for payments made under mistake of fact, s. 73 of our Contracts Act 1950 is quite explicit. The section states that a person to whom money has been paid, or anything delivered, by mistake or coercion, must repay or return it. In the Indian Supreme Court decision of *The Sales Tax Officer, Banaras* C *and Ors v. Kanhaiya Lal Makund Lal Sarat* AIR (46) [1959] SC 135, in considering the equivalent provision of s. 72 of the Indian Contracts Act 1872, NH Bhagwati J stated (at p 143):

> If mistake either of law or fact is established, he is entitled to recover the monies and the party receiving the same is bound to D repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. (see also *Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim* [1998] 2 CLJ Supp 332).

E **[14]** In the case of mistake of fact, it was held in *Barclays Bank Ltd v. W.J. Simms, Son and Cooke (Southern) Ltd* [1980] QB 677 at 695 that "if a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it". This causal test gained currency with the F House of Lords in *Kleinwort Benson Ltd v. Lincoln City Council* [1998] 3 WLR 1095 at 1145 where it was stated that the payer "must prove that he would not have made the payment had he known of his mistake at the time it was made" and that the function of mistake is to show that the benefit which has been G received was an unintended benefit (see also *Chitty on Contracts*, at p 1479, para 30-031).

**[15]** This broad causal test was however qualified by Goff J in *Barclays Bank Ltd v. W.J. Simms, Son & Cooke (Southern) Ltd* where he said that a claim may fail if:

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> (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law to so intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is I authorized to receive the payment) by the payer or by a third

party by whom he is authorized to discharge the debt; or (c) the payee has changed his position on good faith, or is deemed in law to have done so.

**[16]** The last issue of change of position alluded to by Goff J later came to be recognized as a broad defence in the law of restitution by the House of Lords in *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548. It was also probably the first time that the House of Lords had recognized the law of restitution of unjust enrichment which I will deal with shortly. The general principle in relation to the defence of change of position was stated very widely by Goff J in a seminal passage at p 579-580:

In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, *bona fide* change of position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world. It is recognised in the United States of America (see American Law Institute, Restatement of the Law, Restitution (1937), section 142, pp. 567-578 and *Palmer, The Law of Restitution* (1978), vol. III, para. 16.8); it has been judicially recognised by the Supreme Court of Canada (see *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* [1975] 55 DLR (3d) 1); it has been introduced by statute in New Zealand (Judicature Act 1908, section 94B (as amended)), and in Western Australia (see Western Australia Law Reform (Property, Perpetuities and Succession) Act 1962, section 24, and Western Australia Trustee Act 1962, section 65(8)), and it has been judicially recognised by the Supreme Court of Victoria: see *Bank of New South Wales v. Murphett* [1983] 1 VR 489. In the important case of *Australia and New Zealand Banking Group Ltd. v. Westpac Banking Corporation* [1988] 78 ALR 157, there are strong indications that the High Court of Australia may be moving towards the same destination (see especially at pp. 162 and 168, *per curiam*). The time for its recognition in this country is, in my opinion, long overdue.

> I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration … At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.

**[17]** The law in this regard was reviewed in *Niru Battery Manufacturing Co v. Milestone Trading Ltd* [2003] EWCA Civ 1446 where the Court of Appeal held (at the headnotes):

> On a claim for restitution of money paid under a mistake of fact the essential question was whether on the facts it would in all circumstances of the case be unconscionable or inequitable, and thus unjust, to allow the recipient of the money to deny restitution to the payer, that where the recipient knew of the mistake it would generally be unconscionable or inequitable to refuse the restitution; that in order to defeat the defence of change in position it was not necessary to show that the recipient had been dishonest, merely that he had not acted in good faith; that a person who had or thought he had a good reason to believe that a payment had been made to him by mistake failed to act in good faith if he paid the money away without making enquiries of the payer.

**[18]** Earlier, the Privy Council in *Dextra Bank & Trust Co Ltd v. Bank of Jamaica* [2002] 1 All ER (Comm) 193, on the same issue of whether the recipient of money paid under a mistake of fact or law was obliged to repay it, had rejected the introduction of a concept of relative fault. This was consistent with cases which had held that the payer of money may recover no matter how careless or negligent he or she may have been (see *Kelly v. Solari* [1841] 9 M. & W 54 and *Commercial Bank of Australia Ltd v. Younis* [1979] 1 NSWLR 444 as cited in *Bank Bumiputra Malaysia Bhd v. Hashbudin Hashim, supra* at p 341; Goff & Jones, *The Law of Restitution*, 6th ed, at p 199, para 4-028). Also, money paid under a mistake induced by fraud can also be recovered as money had

and received apart from recovery based on a defendant's tortious act under a separate tort of *deceit* (Goff & Jones, *The Law of Restitution*, at p 195, para 4-024).

**[19]** It is noteworthy that as money paid under a mistake is repayable as money had and received, the claim for restitution is founded upon the principle of unjust enrichment. This development of the restitutionary claim of moneys had and received through unjust enrichment was probably inspired by the speech of Lord Mansfield in the case of *Moses v. Macferlan* which I had alluded to earlier. In this regard, it would also be obligatory to refer to, as a starting point on the subject, the speech of Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 61:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another, which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

**[20]** Be that as it may, the law of unjust enrichment in England only saw significant developments recently, all informed by the learning of Lord Goff in *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, which I had alluded to earlier, *Woolwich Equitable Building Society v. Commissioners of Inland Revenue* [1993] AC 70, *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669, and *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349. For the purposes of the instant case, it may be unnecessary to go into the law involved in those cases except perhaps to allude to what Lord Browne-Wilkinson stated in the *Woolwich* case at p 197: "the concept of unjust enrichment lies at the heart of all individual instances in which the law does give a right of recovery."

**[21]** Any claim for restitution through unjust enrichment presupposes three subordinate but inter-related principles:

(a) the defendant has been enriched by a benefit;

(b) the benefit must have been gained at the expense of the plaintiff;

A (c) the benefit must be gained in circumstances where it would be unjust to allow the defendant to retain it (Goff & Jones, *The Law of Restitution*, at p 17, para 1-016).

**[22]** All three elements of unjust enrichment have to be
B considered to justify this restitutionary remedy. As I had alluded to earlier, the defendant may rely on the broad defence of change of position, for example, to deny the remedy.

**Is The Defendant Obliged To Repay On The "Overdraft"?**

C **[23]** It is indisputable that the overdraft facility was created through a mistake on the part of the bank. As admitted by the defendant, no application was made for such a facility. There was also evidence adduced by the plaintiff bank that some form of fraud had been perpetrated by rogues who were out to enrich
D themselves at the expense of the plaintiff bank. It was through the machinations of these rogues that the overdraft facility was wrongfully created. With this factual matrix, there was, to my mind, more than sufficient evidence that moneys had been made available and eventually paid over under a mistake of fact to the
E defendant. The causal test was also satisfied as it seemed pretty obvious to me that no such moneys would have been made available or paid over if the plaintiff bank had known about the mistake or the fraud. This is further fortified by the fact that no consideration was provided for the overdraft facility.

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**[24]** The only question that I think remained to be considered is whether the defence of change of position was available to the defendant as she did plead ignorance and claimed that she no longer had the moneys as the sum of RM200,000 was paid to the
G third party as commission and the rest had been taken by her brother who had absconded. Now, even assuming these claims to be true, it does appear to me that the defendant was not entirely oblivious of what had transpired in relation to how the facility was created. The defendant may not have known with precision as to
H how the third party was going to make the overdraft facility available but she certainly would have known that what the third party was going to do to make the facility available could not have been above board.

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**[25]** Even if it was her brother who was instructing her at all times as she claimed, I do not think she can play innocent here. She was the one who operated the current account and she was the one issuing the cheques of her trading firm to herself individually. She also had knowledge that a sum of RM200,000 was going to be paid to the third party. In a nutshell, she was really a party, *albeit* a passive one, to the illicit plan.

**[26]** With the evidence that was presented and even allowing for all the possible inferences to be made in her favour, it was my assessment that, at the very least, she knew of the mistake by the bank in making available the overdraft facility. Of course, at the worst, she was complicit to the illicit plan to defraud the bank. In either case, she was certainly not acting in good faith. In fact, the evidence, as I have alluded to thus far, shows that, if not dishonesty, there was certainly an element of bad faith on her part. Her claims of fault on the part of the bank must be seen in this light. In any event, a consideration of fault or even negligence or carelessness on the part of the plaintiff bank, as the law suggests, is irrelevant. It was beyond doubt that the defendant had been enriched at the expense of the plaintiff bank. In the circumstances, it would be unconscionable and inequitable and therefore unjust to deny restitution to the plaintiff bank.

**[27]** Now there was some confusion on the part of the plaintiff bank when they tried to claim the usual interest, penalty interest, service charge and commitment fees that usually follow withdrawals made on an overdraft facility. I do not think it was open to the plaintiff bank to treat the defendant as having obtained a legitimate overdraft facility and then proceed to levy various charges as outlined earlier. It would be akin to blowing hot and cold at the same time. Either they had granted the overdraft facility or they had not. It was clear in the instant case that they had not. There was no such agreement to do so. The plaintiff bank was therefore only entitled to restitution.

**[28]** In this regard, the assistant branch manager of the plaintiff (PW1) confirmed that the net amount withdrawn on the created overdraft was RM637,444.71. This sum was arrived at after deducting the balance of RM146.46 that existed at the time the facility was utilized by the defendant and deducting a sum of RM161,298 which was deposited by the defendant after the use of the facility as well as deducting the various charges levied including interest.

**[29]** With respect to the counterclaim, in view of the conclusion that the moneys which were received by the defendant were paid over on account of a mistake of fact, the counterclaim cannot be sustained. Since the defendant had refused to pay over the moneys when requested to do so by the plaintiff bank, it was reasonable for them to freeze the account. I think it became imperative for them to do so when the fraud was discovered. For these reasons, the counterclaim must therefore fail.

## Conclusion

**[30]** In the result, judgment is entered for the plaintiff against the defendants for the sum of RM637,444.71 together with interest at the rate of 8% per annum from the date of the writ until realization and costs. The counterclaim is dismissed with costs. After hearing the parties, I assessed the costs for both the claim and the counterclaim at RM20,000.